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SABAH FOREST INDUSTRIES SDN BHD

v.

MAZLAN ALI

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HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[SUIT NO: K22-179-2004]
29 JUNE 2012

C

LAND LAW: *Easement - Right of way - Whether plaintiff's 15-year uninterrupted use of road over defendant's land gave it common law right of way - Whether right of way subject to defendant's right to block access on road - Whether blockage reasonable in view of defendant's protests and plaintiff's knowledge of defendant's unencumbered registered interest - Whether defendant entitled to compensation from plaintiff for use of road - Whether defendant entitled to damages for trespass*

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The plaintiff, for the operation of its mill and timber complex, had built a road running through some private properties, one of which was the defendant's land ('the land') sometime in 1989/1990. The defendant became owner of the land in 2003. The plaintiff had an uninterrupted use of the road until December 2004 when the defendant erected a barrier across the road. This was due to the fact that while the plaintiff compensated other adjoining private land owners for the use of the road running through their lands, it refused to pay compensation to the defendant in reliance on a representation made to it by the State Government in 1995 that the area where the road ran through the defendant's land was earmarked for a road reserve. That representation, however, never materialised. The title deed of the land when the defendant became its owner also did not contain any endorsement that the road reserve was to be built. The plaintiff filed the instant action for a declaration that it had acquired a right of way over the land and for damages caused by the defendant's obstruction of it. The defendant counterclaimed for damages for trespass.

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Held (dismissing plaintiff's claim with costs and allowing the counterclaim with costs):

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(1) Although the plaintiff had acquired a right of way by virtue of uninterrupted usage of the constructed road for 15 years that right was subject to the defendant's right to block access of the road. (paras 13 & 15)

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(2) The plaintiff, by virtue of the defendant's protest, ought to have known that the defendant, if he so wished, had the right to block off the road in view of the unencumbered title deed. In view of the length of notice the plaintiff had of the defendant's registered unencumbered interest, the blockage was reasonable. (para 15)

(3) In the interest of justice and the fact that the plaintiff had paid adjoining owners compensation, the defendant was entitled to compensation for the plaintiff's use of the land from the date of his ownership of the land until the he took possession of the road. He was, however, not entitled to claim any damages after the date he took possession of the road by blocking it. Once in possession of the road the defendant had a free hand to do whatever he wanted to do. (paras 18 & 20)

(4) The defendant was not entitled to claim for damages to his land for the simple reason that when he bought the land he was presumed to have known of the road's existence. (para 21)

(5) The plaintiff was not a trespasser as it had entered onto the defendant's land on the State Government's representation and there was also never any objection made by the land's former owner. (para 19)

Case(s) referred to:

Lye Thean Soo & Ors v. Sykt Warsaw [1990] 2 CLJ 743; [1990] 1 CLJ (Rep) 160 SC ***(foll)***

Wangsa Timber Industries Sdn Bhd & Ors v. Adulfast Anthony Robert & Anor [2001] 4 CLJ 498 CA ***(foll)***

For the plaintiff - Celestina Stuel Galid; M/s Jayasuriya Kah & Co
For the defendant - Sonny Durai; M/s Mahap Jelani & Co

Reported by Ashok Kumar

JUDGMENT

David Wong Dak Wah J:

Proceeding

[1] The plaintiff's claim is for a declaration that the plaintiff had acquired a right of way over part of the defendant's land (plaintiff's constructed road) and for damages caused by the defendant's blockage of the plaintiff's constructed road.

[2] The defendant had also counterclaimed against the plaintiff for trespass on his land and damages for such trespass.

Background Facts

[3] The plaintiff is a private limited company set up by the Sabah Government with the objective of diversifying wood utilisation and maximisation of the use of all timber species. Pursuant to that objective an integrated pulp and paper mill was set up and operation started in 1988.

[4] The defendant is, and in 28 March 2003, became the registered owner of the land on which the plaintiff's constructed road is situated. That land is situated at Kg Pantai, Sipitang. The immediate owner of the land is one AK Talib Pg Ally (DW3) whose testimony is that he was never in that area and was not aware of the presence of the plaintiff's constructed road.

[5] The plaintiff constructed a road sometime in 1989 or 1990 for their operation and that road runs through the Beaufort-Sindumin road and some private properties.

[6] The plaintiff had uninterrupted use of the constructed road until 12 December 2004 when the defendant erected a barrier across the road which in effect obstructed the plaintiff's operation of the mill and timber complex.

Issues

[7] The determinative issue as I see it is simply this:

> Whether the plaintiff by their uninterrupted use of the constructed road had obtained a common law right of way over the defendant's land?

The Plaintiff's Claim

[8] It is undisputed that the plaintiff had tried to apply for a right of way in the land office over the defendant's land well back in 1995 but was rejected on the ground that the State Government had intended to excise that area on which the constructed road is situated to be a road reserve. It is also the stand of the plaintiff that the State Government as late as November 2004 had informed it that the constructed road area is earmarked as a road reserve.

[9] It is also in evidence that the defendant had asked for compensation from the plaintiff for the use of the road but the plaintiff refused to do so as the defendant's name was not on the list of owners, prepared by the Lands and Surveys Department, who are entitled to

compensation. It is not on that list as the State Government had intended to excise that constructed road as a road reserve. The plaintiff relied on such representation by the State Government. Unfortunately for the parties, the State Government never carried out that intention.

[10] Because of the refusal of the payment of compensation by the plaintiff to the defendant, a dispute has arisen resulting in this suit.

[11] Relevant to this issue is the undisputed fact that when the defendant became the owner of the land, the title deed contained no endorsement of any road reserve as promised by the Sabah Government.

[12] Learned counsel for the plaintiff in submitting that the plaintiff had acquired a common right of way referred to the cases of *Lye Thean Soo & Ors v. Sykt Warsaw* [1990] 2 CLJ 743; [1990] 1 CLJ (Rep) 160 and *Wangsa Timber Industries Sdn Bhd & Ors v. Adulfast Anthony Robert & Anor* [2001] 4 CLJ 498. Both cases are of high authority, as such I am bound by them. For clarity the Supreme Court held as follows:

(i) Apart from legislation, dedication is also a method by which a right of way may be created.

(ii) In this case the path has been used by the public, particularly those living in the vicinity for many years, even before the third appellant acquired ownership of the land, without interruption. He had taken no steps to ensure that a public right of way was not so created. The path has been used and enjoyed by the public as a right for so many years openly and without interruption and must be known to the owner of the land.

(iii) The respondents were merely using the common law method of establishing a public right of way by proof of dedication. The learned judge was within his right to accept it. There is no reason to interfere with his decision.

[13] Based on what the Supreme Court said, I have no problem in finding that the plaintiff had acquired a right of way by virtue of uninterrupted usage of the constructed road for 15 years. However, it is not insignificant that the plaintiff's use of the constructed road was premised on the representation of the Sabah Government that the constructed road will be excised from the defendant's land title deed as a road reserve. However that representation remains up to today a mere representation as the State Government took no step to crystallise it. As late as 18 December 2002 when the land title was issued, there was still provision to excise part of the defendant's land for road reserve.

[14] What had happened next was that the defendant wanted compensation to be paid for the use of his part of land. The plaintiff became aware of the defendant's claim for compensation via a letter dated 18 March 2004 from Encik Ariffin (p. 10 exh. C) which states that the defendant was disputing the plaintiff's right to use the constructed road on the ground that there is no such provision of road reserve for the constructed road. The plaintiff in fact replied to the defendant by a letter dated 26 March 2004 (p. 62 exh. A). Various correspondences were exchanged between counsel for the plaintiff and defendant. The crux of these correspondences is the defendant's demand for compensation as was given to adjoining land owners by the plaintiff.

[15] In my view the plaintiff by virtue of the defendant's protest ought to have known that the defendant if he so wishes had the right to block off the road in view of the unencumbered title deed. This was what the defendant did on 12 December 2004 which is some eight months from the first notice. In view of the length of notice of the defendant's registered unencumbered interest, I find the blockage to be reasonable. In other words, the plaintiff's right of way is subject to the defendant's right to block access of the constructed road.

[16] In the circumstances, plus the plaintiff's refusal to pay the defendant compensation, I find that the plaintiff is not entitled to claim for any damages.

[17] Accordingly, I dismiss the plaintiff's claim with costs in the sum of RM10,000.

The Defendant's Counterclaim

[18] As for the counterclaim, I wish to state from the outset that the defendant is not entitled to claim any damages after 12 December 2004 which is the date he took possession of the constructed road by blocking it. To contend that he is entitled to damages because of a hanging suit over his head (as put by his counsel) is with respect without merit. Once in possession of the constructed road, the defendant had a free hand to do whatever he wanted to do.

[19] As for the defendant's contention that the plaintiff is a trespasser, in view of my finding that the plaintiff had acquired a right of way, I find that the plaintiff is not a trespasser as they had entered into the defendant's land on the State Government's representation and never objected to by DW3.

[20] Be that as it may, in the interest of justice and the fact the plaintiff had paid adjoining owners, compensation, the defendant is entitled to compensation for the use of the land from the date of his ownership (28 March 2003) until he took possession of the constructed road (12 December 2004).

[21] However it is my view that the defendant is not entitled to claim for damages to his land for the simple reason that when he bought the land he is presumed to have known of the existence of the constructed road. Further let me add, I also find it unacceptable that DW3 was also not aware of the existence of the constructed road. The principle of constructive notice applies here in view of the existence of the constructed road for some 15 years.

[22] Accordingly I order the plaintiff pay compensation, to be assessed by the Deputy Registrar for the use of part of the plaintiff's land from the date of his ownership (28 March 2003) until he took possession of the constructed road (12 December 2004). I also give interest at the rate of 4% per annum on the compensation amount from the date of judgment to the date of full payment. As for costs of this counterclaim I award to the defendant the sum of RM5,000.

[23] As for the costs of the injunction application, I award to the defendant the sum of RM5,000.

[24] Order accordingly.